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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 752

POLAKOW'S REALTY EXPERTS, INC.,
Petitioner,

vs.

THE STATE OF ALABAMA.

No. 753

P. S. STRUMPF,
Petitioner,

vs.

THE STATE OF ALABAMA.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

HORACE C. WILKINSON,
Counsel for Petitioners.

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THE STATE OF ALABAMA.

No. 753

P. S. STRUMPF,
Petitioner,

vs.

THE STATE OF ALABAMA.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

To the Honorable Supreme Court of the United States:

Your petitioners, P. S. Strumpf, a citizen of the State of Alabama, and a citizen of the United States of America, and Polakow's Realty Experts, Inc., a corporation organized under the laws of the State of Alabama, and chartered and empowered to buy and sell real estate, respectfully

prays that writs of certiorari issue out of this Honorable Court to review the final judgment of the Supreme Court of Alabama, rendered in the above styled causes (which were consolidated by said court and decided together), on the 19th day of November, 1942, and reported in — So. (2d) at page —, whereby the said Supreme Court of Alabama overruled petitioners' application for a rehearing of the judgment rendered by said Court on October 22, 1942 wherein said Court reversed the judgment of the Bessemer Division of the Circuit Court of the Tenth Judicial Circuit of Alabama, rendered in each of said cases on March 20, 1942, holding Chapter 14 of Title 46 and Section 298 of said Chapter 14, Alabama Code 1940, unconstitutional, sustaining a demurrer to the indictment in each case and discharging each defendant in each case, and in support of their separate petitions for a certiorari each petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

Polakow's Realty Experts, Inc. is an Alabama corporation. Its business is purchasing land, laying it out in subdivisions, and selling the lots. For this purpose it employs salesmen, some on a salary, some on commission, some on a salary and commission, to sell its lots. It does not undertake to sell or handle any property for others. Its activities are confined exclusively to real estate owned by the corporation.

P. S. Strumpf is an employee of Polakow's Realty Experts, Inc. employed by the corporation to sell its lots. He devotes his entire time to the business of the corporation. He is an all time employee of the corporation having no other employment.

The corporation and the employee were each indicted for an alleged violation of the "Alabama Real Estate Law."

The Alabama Statute and the indictments are set out in the Appendix. Briefly, they were indicted for engaging in the private business of a real estate broker or a real estate agent, without obtaining a permit from the Alabama Real Estate Commission so to do.

When the cases were called in the Circuit Court each defendant demurred to the indictment on the ground, *inter alia*, that the statute was null and void in that it is violative of the 14th Amendment to the Constitution of the United States of America in that it deprived the individual defendant Strumpf of the right to work for a living in a common, innocuous occupation in the community without procuring a permit to work at such occupation, and deprived the corporate defendant of its right to sell its property except through a "licensed" real estate broker.

The Circuit Court sustained the demurrer, adjudged the statute unconstitutional, and discharged each defendant.

The State of Alabama appealed to the Supreme Court of Alabama, as it has a right to do in cases where a nisi prius court holds a statute unconstitutional. Title 15, Sec. tion 15, Code of Alabama, 1940. The Justices of the Supreme Court of Alabama divided. Four of the Justices, a majority of one, decided that the statute was not offensive to the Federal Constitution and reversed the case. Two Justices dissented, being of the opinion that the act offended both the State and Federal Constitutions. One Justice, who was Attorney General of the State when the prosecution was instituted, did not sit in the case.

Opinions Below.

The majority opinion and the response to the application for a rehearing was written by Mr. Chief Justice Gardner. The dissenting opinion was written by Mr. Justice Brown. Both are reported in — So. (2d) —.

II.

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under Section 344 U. S. C. A. (Judicial Code, Section 237, amended February 13, 1925) subsections (a) and (b) separately and severally.

III.

Reasons Relied On for the Allowance of the Writs.

1. The Supreme Court of Alabama in deciding that the Alabama Real Estate Law, Chapter 14 of Title 46 and Section 298 of said Chapter 14, Alabama Code 1940, was not violative of the 14th Amendment to the Constitution of the United States decided an important question of Federal Law, which has not been, but should be, settled by this Court.

The importance of the question arises from the fact that the highest Courts of the States which have passed on a similar statute are divided and the Justices of the Supreme Court of Alabama are themselves divided as to the constitutionality of the statute.

2. The Supreme Court of Alabama decided an important question of Federal law very probably in conflict with applicable decisions of this Court. Among these decisions are:

Truax v. *Raich*, 239 U. S. 33;
Adams v. *Turner*, 244 U. S. 590;
Williams v. *Standard Oil Co.*, 278 U. S. 235;
New State Ice Co. v. *Liebmann*, 285 U. S. 262;
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522;
Ribnik v. *McBride*, 277 U. S. 350;
Kent Stores v. *Wilentz, Atty. Gen.*, 14 F. (2d) 1.

3. The Supreme Court of Alabama erroneously ruled that all questions presented by a consideration of the Fourteenth Amendment were in the minds of the members of the Court when *Bratton* v. *Chandler*, 260 U. S. 110, was decided. The decision in that case plainly shows that this Court only dealt with the power of the Commission under Section 8 of the Act—and not with the validity of the Act.

Questions Presented.

So far as the individual is concerned the controlling question is whether the State of Alabama can bar an individual from selling real estate—or acting as a real estate broker—until he makes a showing to the Alabama Real Estate Commission that he is "trustworthy and competent to transact the business of a real estate broker or real estate salesman *in such manner as to safeguard the interests of the public*" and obtains a license from the Commission, and thereby deprive him of the right to work for a living in a common, innocuous occupation in the community, until he obtains such license.

The controlling question, in so far as the corporation is concerned, is whether the State of Alabama can make it a crime for a corporation to dispose of its own property through its own "unlicensed" employees.

Specification of Errors to Be Urged.

The Honorable Supreme Court of Alabama erred:

1. In reversing the judgment of the Bessemer Division of the Jefferson Circuit Court discharging petitioners.

2. In holding that the "Alabama Real Estate Law" Sec. 298, et sequa, Code of Alabama 1940, Title 46, Act No. 344, Acts 1927 p. 335, was not violative of the 14th Amendment to the Constitution of the United States of America.

3. In holding that a citizen of the United States was guilty of a crime if he sold real estate for the owner without obtaining a permit from the Alabama Real Estate Commission so to do.

4. In holding that an Alabama corporation, duly chartered to buy, own and sell real estate was guilty of a crime if it employed an agent to sell its property who did not have a permit from the Alabama Real Estate Commission so to do.

Prayer.

Wherefore your petitioners, separately and severally pray, (though it is agreeable to have the cases considered together as was done in the Supreme Court of Alabama) that writs of certiorari issue under the seal of this Court, directed to the Supreme Court of Alabama commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in case numbered 6 Div. 18 and entitled on its docket, The State of Alabama, Appellant, vs. Polakow's Realty Experts, Inc., a corporation, Appellee, and in case numbered 6 Div. 22 and entitled on its docket The State of Alabama, Appellant, vs. P. S. Strumpf, Appellee, to the end that said causes may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the Supreme Court of Alabama in each case be reversed by the Court and for such other relief as to this Court may seem proper.

HORACE C. WILKINSON,
Counsel for Petitioners.

APPENDIX.

Alabama Statutes

Indictment Against P. F. Strumpf

Indictment Against Polakow's Realty Experts, Inc.

Sections 298 to 303, Alabama Real Estate Law,
Title 46, Chapter 14,
Alabama Code 1940.

"Sec. 298. License Required.—It shall be unlawful for any person, copartnership, association or corporation to act as a real estate broker or real estate salesman, or to advertise or assume to act as such real estate broker or real estate salesman without a license issued by the Alabama real estate commission. No co-partnership, association or corporation, shall be granted a license, unless every member or officer of such co-partnership, association or corporation, who actively participates in the brokerage business of such co-partnership, association or corporation, shall hold a license as a real estate broker or salesman, as hereinafter provided for, and unless every employee who acts as a salesman for such a co-partnership, association shall hold a license as a real estate salesman.

"Sec. 299. Definitions; to whom chapter applies.—A real estate broker within the meaning of this chapter is any person, firm, partnership, co-partnership, association or corporation, who, for compensation or valuable consideration, sells or offers for sale, buys or offers to buy, negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, rents or offers for rent, any real estate or the improvements thereon for others, as a whole or partial vocation. The term 'real estate' as used in this chapter shall include leaseholds and other interests less than leaseholds. A real estate salesman within the meaning of this chapter is any person who, for a compensation or valuable consideration, is employed either directly or indirectly by a real estate broker to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase or sale or exchange of real

estate, or to lease, to rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon, as a whole or partial vocation. One act for a compensation or valuable consideration of buying or selling real estate of or for another, or offering for another to buy or sell, or exchange real estate, or leasing, or renting, or offering to rent real estate, except as herein specifically excepted, shall cause the person, firm, partnership, co-partnership, association or corporation, performing, offering, or attempting to perform any of the acts enumerated herein to become a real estate broker or a real estate salesman within the meaning of this chapter. The provisions of this chapter shall not apply to any person, co-partnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as an incident to, the management of such property and the investment therein, nor shall the provisions of this chapter apply to persons acting as attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing, or exchange of real estate, nor shall this chapter be construed to include in any way the services rendered by an attorney-at-law, in the performance of his duties as such attorney-at-law; nor shall it be held to include, while acting as such, a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of court, nor to include a trustee acting under a trust agreement, deed of trust, or will, or the regular salaried employees thereof.

"Sec. 300. Creation of real estate commission; members; compensation; expenses, etc.—There is hereby created the Alabama real estate commission. The governor shall appoint three persons, each of whom immediately prior to the date of his appointment has been a resident of the state for five years, and whose vocation for a period of at least five years shall have been that of a real estate broker or real estate salesman; the term of the members of said commis-

sion shall be for three years, and until their successors are appointed and qualify. There shall at no time be more than one commissioner from any one county. Members to fill vacancies shall be appointed for the unexpired term. The commission immediately upon the qualification of the member appointed in each year shall organize by selecting from its members a chairman, and may do all things necessary and convenient for carrying into effect the provisions of this chapter and may from time to time promulgate necessary rules and regulations. Each member of the commission shall receive as full compensation for each day actually spent on the work of said commission the sum of ten dollars per day and his actual and necessary expenses incurred in the performance of duties pertaining to his office. The commission shall employ, and at its pleasure discharge, a secretary and such clerks and assistants as shall be deemed necessary to discharge the duties imposed by the provisions of this chapter, and shall outline their duties and fix their compensation, subject to the general laws of the state. The commission shall obtain such office space, furniture, stationery, fuel, light, and other proper conveniences as shall be reasonably necessary for carrying out the provisions of this chapter. The principal office shall be located in the city of Montgomery, Alabama. The commission shall adopt a seal with such design as the commission may prescribe engraved thereon, by which it shall authenticate its proceedings. Copies of all records and papers in the office of the commission, duly certified and authenticated by the seal of said commission shall be received in evidence in all courts equally and with like effect as the original. All records kept in the office of the commission under authority of this chapter shall be open to public inspection under such rules and regulations as shall be prescribed by the commission. All fees and charges collected by the commission under the provisions of this chapter shall be paid into the treasury, and shall constitute a separate fund to be disbursed by the treasurer on order of the board of commissioners and with the approval of the governor. All expenses incurred by the commission under the provisions of this chapter, including the compensation of members, secretaries, clerks

and assistants shall be paid out of the separate fund in the treasury upon warrants of the comptroller drawn upon the treasurer from time to time when vouchers therefor are exhibited and approved by the commission and approved by the governor. The treasurer is directed to pay out of the separate fund hereinabove provided upon the order of the secretary of the board of commissioners, countersigned by the chairman of the board of commissioners and approved by the governor, provided the total expenses for every purpose incurred shall not exceed the total fees and charges collected and paid into the state treasury and all moneys remaining in the separate fund herein provided for at the end of the fiscal year not expended as herein provided for shall be covered into the treasury and shall be and become a part of the general fund of the state.

"Sec. 301. To whom licenses granted.—Licenses shall be granted only to persons who are trustworthy and competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interests of the public, and only after satisfactory proof has been presented to the board. An applicant for a real estate broker's license shall prove his competency to the commission by the taking of an examination prescribed by the board either in written form or by oral questionnaire; said examination relating to the principles of real estate practice and of business ethics pertaining thereto, and said applicant in addition to the original license fee shall pay an examination fee of five dollars, which examination fee shall cover all examinations prior to the issuance of such original broker's license. The applicant must be a person whose application has not been rejected in this or any other state within two years prior to date of application.

"Sec. 302. Requisites of application.—Every applicant for a real estate broker's license shall apply therefor in writing upon blanks prepared or furnished by the real estate commission. Such application shall be accompanied by the recommendation of at least two citizen real estate owners, not related to the applicant, who have owned real estate for a period of one year or more, and who have known applicant

for a period of six months, in the county in which said applicant resides, or has his place of business, which recommendation shall certify that the applicant bears a good reputation for honesty, truthfulness, fair dealing and competency, and recommending that a license be granted to the applicant. Every application for a broker's license shall state the name of the person, firm, partnership, co-partnership, association or corporation with which he will be associated in the business of real estate, and the location of the place, or places, for which said license is desired and set forth the period of time, if any, which said applicant has been engaged in the real estate business. Every applicant for a license shall furnish a sworn statement setting forth his present address, both of his business and residence, a complete list of all former places where he may have resided or been engaged in business for a period during the last five years, accounting for such entire period, and the length of such residence, together with the name and address of at least one real estate owner in each of said counties where he may have resided or have been engaged in business, and whether he has been convicted of a criminal offense involving moral turpitude, and if so, what offense. Every applicant for a salesman's license shall, in addition to the requirements of this section, also set forth the period of time, if any, during which he has been engaged in the real estate business, stating the name and address of his last employer, and the name and the place of business of the person, firm, partnership, co-partnership, association or corporation then employing him, or into whose service he is about to enter. The application shall be accompanied by a written statement by the broker in whose service he is about to enter, stating that in his opinion the applicant is honest, truthful, and of good reputation, and recommending that the license be granted to the applicant. Every application for a license, under the provisions of this chapter, shall be accompanied by the license fee herein prescribed. In the event that the commission does not issue the license, the fee shall be returned to the applicant. The commission is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the

application for any license as shall be deemed necessary to administer and enforce the provisions of this chapter. All such rules and regulations to be subject to the approval of the governor.

"Sec. 303. Hearing and determination before granting or refusing.—The commission, after application in proper form has been filed, shall, before refusing to issue a license, set the application down for a hearing and determination as hereinafter provided in section 306 of this title."

Indictment.

THE STATE OF ALABAMA, JEFFERSON COUNTY.

CIRCUIT COURT, BESSEMER DIVISION, OCTOBER TERM, 1941.

1. The Grand Jury of said County, charges that before finding of this indictment P. S. Strumpf whose name is otherwise unknown to this Grand Jury and within twelve months before the finding of this indictment, did, for a valuable consideration or compensation, as a whole or partial vocation, sell or offer to sell, buy or offer to buy, lease or offer to lease, rent or offer to rent, or otherwise negotiate the sale, purchase, or exchange of real estate or an interest therein as agent or salesman of another without having first procured a license from the Alabama Real Estate Commission, so to do as provided by law and contrary to law,

2. The Grand Jury of said County further charges, that before the finding of this indictment, P. S. Strumpf whose name is otherwise unknown to this Grand Jury and within twelve months before the finding of this indictment, did, for a valuable consideration or compensation, as a whole or partial vocation, sell or offer to sell, buy or offer to buy, lease or offer to lease, rent or offer to rent, or otherwise negotiate the sale, purchase or exchange of real estate or an interest therein as agent or salesman of another without having first procured a license, so to do as provided by law and contrary to law,

3. The Grand Jury of said County further charges that, before the finding of this indictment P. S. Strumpf whose

name is otherwise unknown to this Grand Jury and within twelve months before the finding of this indictment, did, for compensation or a valuable consideration, sell or offer to sell, rent or offer to rent, buy or offer to buy, lease or offer to lease, or otherwise negotiate the sale, purchase, or exchange of real property or an interest therein as a real estate salesman or a real estate broker without having first procured a license from the Alabama Real Estate Commission, so to do as provided by law and contrary to law,

4. The Grand Jury of said County further charges that, before the finding of this indictment, P. S. Strumpf, whose name is otherwise unknown to this Grand Jury and within twelve months before the finding of this indictment, did, for compensation or a valuable consideration, sell or offer to sell, rent or offer to rent, buy or offer to buy, lease or offer to lease, or otherwise negotiate the sale, purchase, or exchange of real property or an interest therein as a real estate salesman or a real estate broker without having first procured a license, so to do as provided by law and contrary to law against the peace and dignity of the State of Alabama.

Arthur Green, Deputy Solicitor.

Indictment.

THE STATE OF ALABAMA, JEFFERSON COUNTY.

CIRCUIT COURT, BESSEMER DIVISION, OCTOBER TERM, 1941.

1. The Grand Jury of said County, charges that before finding of this indictment that within twelve months before the finding of this indictment, Polakow's Realty Experts, Inc., a corporation, whose name is otherwise unknown to this Grand Jury, acting as the agent of another, did employ salesmen or agents compensated on a commission basis and which said agents had not first procured a license from the Alabama Real Estate Commission so to do, did sell or offer for sale as real estate salesmen or agents, real property or an interest therein, and contrary to law,

2. The Grand Jury of said County further charges that, before the finding of this indictment, Polakow's Realty Experts, Inc., a corporation, whose name is otherwise unknown to this Grand Jury and within twelve months before the finding of this indictment, for a valuable consideration or compensation as the agent of another and as a whole or partial vocation, did sell or offer to sell, rent or offer to rent, lease or offer to lease, or did otherwise negotiate the purchase, sale, or exchange of real property without having first procured a license from the Alabama Real Estate Commission, so to do and as provided by law and contrary to law, against the peace and dignity of the State of Alabama.

Arthur Green, Deputy Solicitor.

Propositions of Law.

Proposition I.

The right to work for a living in the common occupations of the community is of the very essence of personal freedom that it was the purpose of the 14th Amendment to procure.

Traux v. *Raich*, 239 U. S. 35;
N. C. Law Review, Vol. 17, page 1.

Proposition II.

The power to regulate a business does not necessarily include the power to exclude persons from engaging in it.

State v. *Harris*, 216 N. C. 746, 6 S. E. (2d) 854;
Replogle v. *City of Little Rock*, 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333;
People ex rel. Durham Realty Corp. v. *LaFetra*, 230 N. Y. 429, 103 N. E. 601, 16 A. L. R. 152;
State v. *Porter*, 94 Conn. 639, 110 A. 59;
State of Ohio v. *Helvering*, 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1037.

Proposition III.

The real estate business is a harmless, innocuous business and one's right to follow it cannot be destroyed by legislation.

Rawles v. *Jenkins*, 279 S. W. 350;
State v. *Harris*, 216 N. C. 746, 6 S. E. (2d) 854;
Williams v. *Standard Oil Co.*, 278 U. S. 235;
New State Ice Co. v. *Liebmann*, 285 U. S. 262;
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522;
Ribnik v. *McBride*, 277 U. S. 350, 56 A. L. R. 1327;
Adams v. *Tanner*, 244 U. S. 590;
Bramley v. *State*, 2 S. E. (2d) 647;

Richardson v. *Coker*, 3 S. E. (2d) 636;
State v. *Dixon*, 215 N. C. 161, 1 S. E. (2d) 521;
Richey v. *Smith*, 84 Pac. 851, 5 L. R. A. (NS) 674;
Replogle v. *Little Rock*, 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1335;
City of Osceola v. *Blair*, 231 Iowa 771, 2 N. W. (2d) 83;
DeBerry v. *City of La Grange* (*Ga.*), 6 S. E. 146;
Bushman v. *Bechtel*, 114 Pac. 227;
Kent Stores v. *Wilentz, Atty. Gen.*, 14 Fed. Rep. 1.

Argument.

May it please the Court:

Mr. Tiedeman, in his work on *State and Federal Control of Persons and Property*, expressed the self-evident truth in the following language, at page 236:

> "No man's liberty is safe if the legislature can deny him the right to engage in a harmless calling."

This court many years ago placed the stamp of its approval upon the idea stated by the author, in the following language:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of personal freedom and opportunity that it was the purpose of the (14th) Amendment to secure."
>
> *Traux* v. *Raich*, 239 U. S. 35.

In view of these pronouncements, it would seem that the question of whether a man must obtain a permit in order to work as a real estate broker or real estate salesman would in a measure depend on whether the real estate business is a common occupation. If so, it would seem that the individual could not be required to obtain a permit to engage in an occupation of that kind. If not, the question would then

be whether the Alabama real estate law is a regulation of the real estate business or a law excluding persons from engaging in such business.

The authorities say that the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. The question is exhaustively discussed in N. C. Law Review, Vol. 17, page 1:

State v. *Harris,* 216 N. C. 746, 6 S. E. (2d) 854.
Replogle v. *City of Little Rock,* 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333.
People ex rel. Durham Realty Corp. v. *LaFetra,* 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152.
State v. *Porter,* 94 Conn. 639, 110 A. 59.
State of Ohio v. *Helvering,* 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1307.

The authorities cited also say that there is a well recognized gap between the regulation of a business or occupation and restrictions preventing persons from engaging in it, to which the court must pay careful attention. While many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not so yielding. Among them the right to earn a living must be regarded as inalienable. Conceding this, a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary, harmless occupations of life by the erection of educational and moral standards of fitness is legal grotesquety.

State v. *Harris,* 216 N. C. 746, 6 S. E. (2d) 854.

In *Adams* v. *Tanner,* 244 U. S. 590, the attempt to make it unlawful to operate employment agencies was declared unconstitutional, and it was said that there was nothing in the nature of the business that in any way "threatens or

endangers the public health, safety or morals". In that case it was said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way."

To like effect are:

Ribnik v. *McBride*, 277 U. S. 350, 56 A. L. R. 1327.
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522.
Williams v. *Standard Oil Co.*, 278 U. S. 235.
New State Ice Co. v. *Liebmann*, 285 U. S. 262.

The Supreme Court of Georgia struck down a photography law.

Bramley v. *State*, 2 S. E. (2d) 647.

The Supreme Court of Georgia also struck down a law requiring an electrical contractor to submit to a decision of an examining board as to his ability to satisfactorily complete his contracts with citizens of the city.

Richardson v. *Coker*, 3 S. E. (2d) 636.

In *State* v. *Dixon*, 215 N. C. 161, 1 S. E. (2d) 521, the Supreme Court of North Carolina declared the North Carolina real estate law unconstitutional on the ground that it violated a provision of the North Carolina Constitution relating to local legislation, but in view of that court's decision in *State* v. *Harris*, 216 N. C. 746, 6 S. E. (2d) 854, it would seem that there could be no doubt about what the North Carolina court thinks about the constitutionality of the real estate law.

In the *Harris case* the Supreme Court of North Carolina struck down a state dry cleaning law. This case is one of the best recent cases dealing with the subject.

In *State ex rel. Richey* v. *Smith*, 84 Pac. 851, 5 L. R. A. (NS) 674, an act requiring journeymen plumbers to secure a license as a condition for carrying on their trade was declared unconstitutional.

The Supreme Court of Arkansas reached the same conclusion in *Replogle* v. *Little Rock*, 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1335.

The Supreme Court of Kentucky declared the Kentucky real estate law unconstitutional.

Rawles v. *Jenkins*, 279 S. W. 350.

In *Becker* v. *State*, 185 A. 93, the Superior Court of Delaware declared a dry cleaning law unconstitutional. The decision was based on the proposition that a citizen has a right to make a living in a common occupation without getting a permit from anybody so to do.

In *City of Osceola* v. *Blair*, 231 Iowa 771, 2 N. W. (2d) 83, decided February 10, 1942, the Supreme Court of Iowa declared an ordinance unconstitutional for forbidding the soliciting of orders for goods, wares and merchandise at private residences, and to like effect is *DeBerry* v. *City of La Grange* (Ga.), 6 S. E. 146.

In *Bushman* v. *Bechtel*, 114 Pac. 227, the Supreme Court of Arizona struck down a board of examiners for photography. It was ruled that the business of making photographs is not inherently dangerous to society, but is an entirely innocent occupation and that therefore the police power could not be used to prevent a person from following a business so innocuous, and that the effort to do so was a deprivation of a property right—the right to earn a living—without due process of law.

This court upheld the constitutionality of a blue-sky law in *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539. It was ruled that the integrity of securities can only be assured by the probity of the dealers in them and the information which may be given of them. That reason cannot apply to real

estate that everybody can see and which is assessed for taxes on a public record open to all.

Zerlin v. *La. Real Estate Board,* 103 So. 528; the *Pope Case,* 242 Pac. 290; *Roman* v. *Lobe,* 243 N. Y. 51, 152 N. E. 451, 60 A. L. R. 1329, and *State* v. *Rose,* 122 So. 225, apparently sustain a real estate law similar to the Alabama law.

A three-judge Federal Court declared the dry cleaning law unconstitutional in New Jersey in *Kent Stores* v. *Wilentz, Attorney General of New Jersey,* 14 Fed. Rep., page 1. An interesting classification of the Federal cases is found in the opinion in that case.

Polakow Realty Experts, Inc., is a corporation organized under the laws of the State of Alabama with power to buy, sell and exchange real estate. It could only act through an agent. The effect of the decision by the Supreme Court of Alabama is to say that this corporation cannot employ a person on salary or commission to sell its real estate, unless such person is a licensed real estate broker or a licensed real estate salesman, without being guilty of a crime. This has the effect of depriving the corporation of its property without due process of law.

It is respectfully submitted that the writ of certiorari should issue to the end that this court may properly review the erroneous decision complained of.

This may easily be one of the most important cases ever brought to this court for decision. The right of an American citizen to earn his living by the sweat of his brow, in a common, ordinary innocuous occupation without obtaining a permit, is the main question in the case.

Respectfully submitted,

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Counsel for Petitioners.

(4932)

(16)

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 752

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Petitioner,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT

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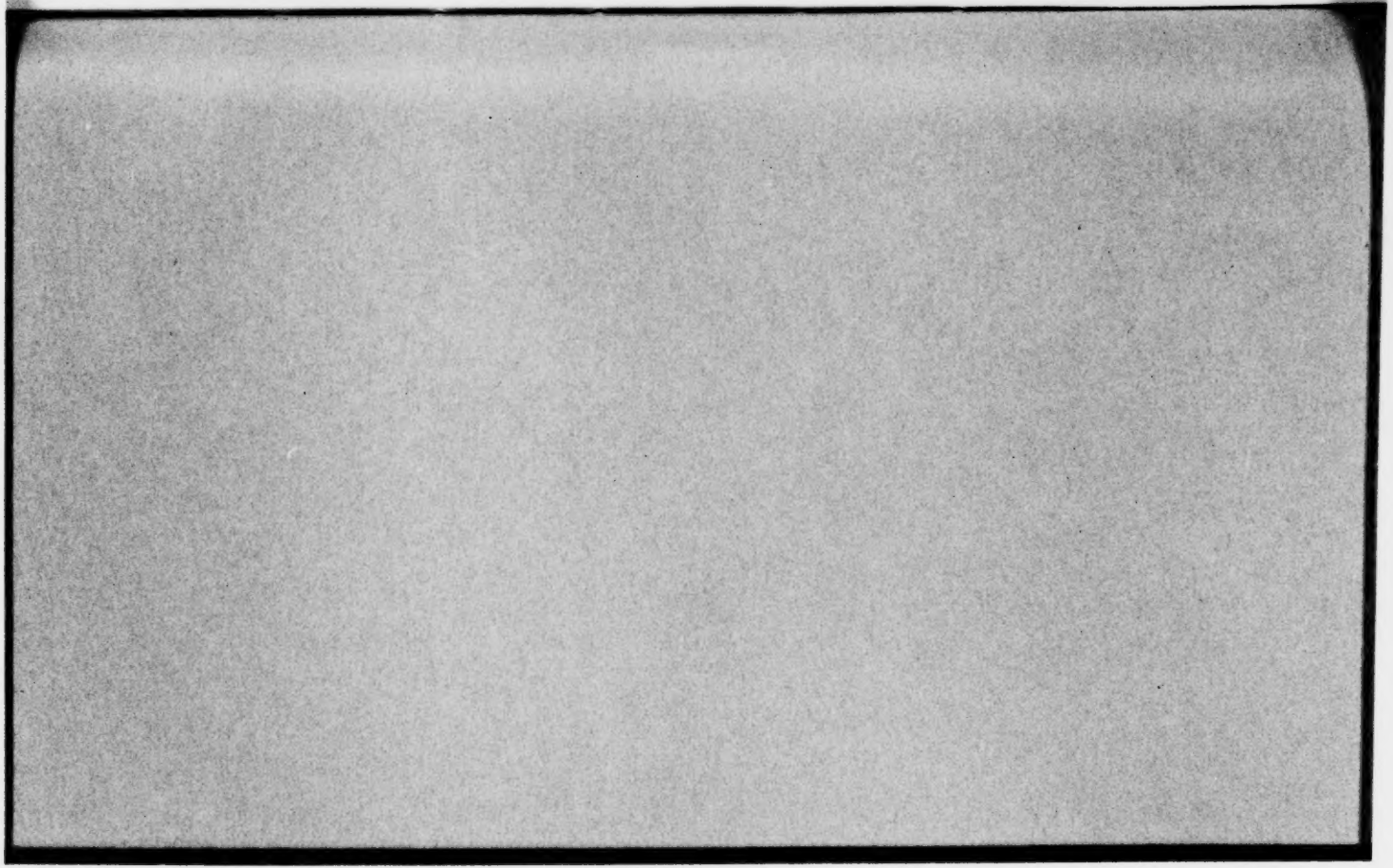

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BRIEF FOR RESPONDENT

I

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama, which is here under consideration, is reported as follows: State of Alabama v. P. S. Strumpf and State of Alabama v. Polakow's Realty Experts, Inc., 10 So. 2nd 461, both cases being decided in one opinion.

II

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this court to review the judgment of the Supreme Court of Alabama rendered on the 22nd day of October, 1942, rehearing denied November 19, 1942. Petitioner relies upon Section 237, subsection (a) and (b) of the United States Judicial Code, as amended on February 13, 1935, (U.S.C.A. Title 28, Section 344), as giving this court jurisdiction.

POINTS RELIED UPON BY PETITIONERS

The points relied upon by petitioners as grounds for relief are as follows:

That the Supreme Court of Alabama in deciding that the Alabama Real Estate Law, Chapter 14 of Title 46 and Section 298 of said Chapter 14, Alabama Code 1940, was not violative of the Fourteenth Amendment to the Constitution of the United States decided an important question of Federal Law which was probably in conflict with this Court's decisions.

That the Writ should be allowed because two of the seven Justices of the Supreme Court of Alabama dissented.

That the case of *Bratton v. Chandler*, 260 U. S. 110, did not decide the validity of a real estate act, but only dealt with the power of the commission created by said act.

III

STATEMENT OF THE CASE

Polakow's Realty Experts, Inc., and P. S. Strumpf were separately indicted in the Circuit Court of Jefferson County, Alabama, Bessemer Division, for engaging in the business of real estate salesman or broker without having first procured a license from the Alabama Real Estate Commission, in violation of the Alabama Real Estate Law set forth in Chapter 14, Sections 298 to 311, inclusive, Title 46, Code of Alabama 1940. To this indictment the defendants filed demurrers attacking the constitutionality of said Law. The Circuit Court sustained these demurrers, and the State appealed to the Supreme Court of Alabama as it had a right to do by statute. The Supreme Court of Alabama, holding that it was a valid exercise of police power for the State to require a license and authorize the real Estate Commission to grant such license "only to persons who are trustworthy and competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interests of the public," reversed the decision of the Circuit Court and remanded the case for new trial.

As will appear from the record only these pleadings have been ruled upon, the merits of the case having not yet been tried nor the defendants convicted under the Law in question.

PROPOSITIONS OF LAW

PROPOSITION I

On appeal or certiorari the jurisdiction of the Supreme Court of the United States to review the decisions of the highest court of a state extends only to final judgments or decrees.

Section 344, *U.S.C.A.* (Judicial Code, Section 237, amended) subsections (a) and (b)

Hughes', Federal Practice, Sections 3188, 3337

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PROPOSITION II

When the highest court of a state reverses the judgment of a lower court and remands the case for a new trial on its merits, or when there has only been an adjudication of the pleadings, and not the merits, of a case, there is not such a final judgment as to give the Supreme Court of the United States jurisdiction on appeal or certiorari.

Rankin v. State, 78 U.S. 380, 11 Wall. 380

St. Clair County v. Lovingston, 85 U.S. 628, 18 Wall. 628

McComb v. Commissioners of Knox County, 91 U.S. 1

Bostwick v. Brinkerhoff, 106 U.S. 3

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Heir of DeArmas v. United States, 47 U.S. 103, 6 Howard 103

Meagher v. Minn. Thresher Mfg. Co., 145 U.S. 608

Missouri & Kansas Ry. Co. v. Olathe, 222 U.S. 185

Indiana ex rel Anderson v. Brand, 303 U.S. 95

PROPOSITION III

A final judgment in a criminal case for the purpose of review by the Supreme Court of the United States contemplates a trial upon the merits followed by a judgment of conviction.

Rankin v. Tennessee, 78 U.S. 380, 11 Wall. 380

Heike v. United States, 217 U.S. 423

Miller v. Aderhold, 288 U.S. 206

Hill v. Wampler, 298 U.S. 460

Pratt v. United States, 102 Fed. 2nd 275

Berman v. United States, 302 U.S. 211

PROPOSITION IV

The Supreme Court of the United States, as well as the other courts of the land, has held that a State legislature, exercising its broad discretion in determining whether an occupation shall be regulated by excluding the dishonest or incompetent, may under its police power require a license of a real estate broker.

Roman v. Loeb, 243 N.Y. 51, 50 A.L.R. 1329

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Bratton v. Chandler, 260 U.S. 110

Riley v. Chambers, 181 Cal. 589, 8 A.L.R. 418

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People ex rel Durham Realty Corporation v. La Fetra, 230 N. Y. 429, 16 A.L.R. 152

Gundling v. Chicago, 177 U.S. 183

Great Atlantic & Pacific Tea Company v. Grosjean, 301 U.S. 412

Schmidinger v. Chicago, 226 U.S. 578

Nebbia v. N. Y., 291 U.S. 502

Bradley v. Richmond, 227 U.S. 477

Brazee v. Michigan, 241 U.S. 340

Hall v. Geiger-Jones Company, 242 U.S. 539.

ARGUMENT

I

THERE BEING NO TRIAL OF THE MERITS IN THESE CASES LEADING TO A JUDGMENT OF CONVICTION UNDER THE ALLEGEDLY UNCONSTITUTIONAL STATUTE, BUT ONLY A JUDGMENT OF THE SUPREME COURT OF ALABAMA ON THE PLEADINGS, I.E., INDICTMENT AND DEMURRER, REVERSING AND REMANDING FOR NEW TRIAL, THERE IS NO FINAL JUDGMENT UPON WHICH TO INVOKE THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

It is the contention of the State of Alabama, the Respondent, that the jurisdiction of the Supreme Court of the United States to review the decision of the Supreme Court of Alabama in these cases is prematurely invoked for that the said decision is not a final judgment, as such is defined by the numerous opinions that have been handed down by this Honorable Court.

The Supreme Court of Alabama held that the trial court erred in sustaining the demurrer to the indictment, and rendered a judgment reversing the cases and remanding them for a new trial. In the lower court, as the record will show, there was never

a trial of the cases on the merits, the petitioners (defendants in the trial court) were never adjudged guilty, sentence has never been passed, and there has been no judgment of conviction.

The State offers to show to this Honorable Court that the decision of the trial court was not final in that the cases were reversed and remanded for a new trial; there has been no trial on the merits, but only on the pleadings, i.e., the indictment and demurrer; and the petitioners have never been convicted and sentenced under the State statute which has allegedly denied them their constitutional right of due process.

A. NECESSITY FOR A FINAL JUDGMENT

Section 344, U.S.C.A. (Judicial Code, Section 237, amended) Subsections (a) and (b), the statute under which the petitioners have requested the issuance of a writ of certiorari, providing that the Supreme Court of the United States may review the decisions of the highest court of a state under certain circumstances, expressly limits such reviewable decisions to final judgment or decrees.

Despite the several revisions of the above cited statute this Court has consistently construed that its jurisdiction will not extend to review the decision of the highest court of the state unless the said decision constitutes a final judgment.

Although prior to that time the same conclusions had been reached, as evidenced in the several cases cited under proposition of Law Number I, perhaps one of the outstanding earlier cases is that of *McLish v. Roff*, 141 U. S. 661, in which Mr. Justice Lamar, in holding that a final judgment was prerequisite to invocation of the jurisdiction of the Supreme Court of the United States, stated as follows:

> "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error have been to save the expense and delays of repeated appeals in the same unit, and to have the whole case and every matter in controversy in it decided in a single appeal."

This same rule of law has been expressly laid down in many other cases, among which are *Louisiana Navigation Company v. Oyster Commission*, 226 U.S. 99, and *Collins v. Miller*, 252 U.S. 364; the latter of which held that "a case may not be brought by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete."

Therefore, it being seen that the jurisdiction of the Supreme Court of the United States to review decisions of the highest court of a state extends only to final judgments, the forthcoming paragraphs are

designed to summarize those legal constructions of the term "final judgments" applicable to the cases at bar.

B. WHEN THE HIGHEST COURT OF A STATE REVERSES AND REMANDS A CASE FOR A NEW TRIAL, THE JUDGMENT IS NOT FINAL.

In regard to the State's contention that a judgment of reversal, remanding the case for a new trial, is not a final judgment, reference is made to the case of *St. Clair County v. Lovingston*, 85 U.S. 628, and 18 Wall. 628, in which the question was resolved as follows:

> "The judgment of the Supreme Court of the State (reversing and remanding the case for a new trial) cannot be regarded as a final judgment in the sense in which the term was used in the judiciary acts. No judgment is final which does not terminate the litigation between the parties to the suit. The issue between the parties may be again tried in the Circuit Court, and another judgment may be recovered, which may be removed to the Supreme Court for revision. Consequently, then, there has been no final determination of the case."

This same conclusion was reached in the case of *Morgan v. Thompson*, 124 Fed. 203, in which there is cited numerous opinions of this Honorable Court.

Mr. Chief Justice White in the case of *Bruce v. Tobin*, 245 U.S. 18, stated that although the judgment of the state court determined the ultimate issue involved, the finality contemplated by the statute was to be determined from the record and the character of the judgment rendered; and the fact that the case was remanded for a new trial precluded all conception of finality for the purpose of review by the Supreme Court of the United States. Reference is also made to *Smith v. Adams*, 130 U.S. 167, *Cincinnati Street Railway Company v. Snell*, 179 U.S. 395, and *Arnold v. Guimarin and Company*, 263 U.S. 427. One of the latest cases concerning this question is that of *Laclede Gas Company v. Public Service Commission*, 304 U.S. 398, in which the Supreme Court of the United States further holds that the reviewable judgment must be final.

A study of these cases reveals that the universally accepted definition of "final judgment" contemplates that such judgment has disposed of the entire case on its merits, directed the judgment which should be entered, and has left nothing to the judicial discretion of the trial court. Reference to the above cited case shows that this rule is applicable both to appeal and certiorari. In the cases at bar the Supreme Court of Alabama reversed and remanded them for a new trial. Not until such new trial takes place will the merits of the case be introduced and decided upon. The State earnestly submits that it necessarily follows, both from logic and precedent, that the judgment of the Supreme Court of Alabama

is not final, and, therefore, not reviewable by this Court.

C. WHEN THERE HAS BEEN NO TRIAL ON THE MERITS OF A CASE, BUT ONLY A DECISION ON THE PLEADINGS, THERE IS NO FINAL JUDGMENT.

It is further contended by the State that inasmuch as only the pleadings were decided upon, and the merits of the case still remain to be tried, the judgment of the Supreme Court of Alabama is not final and is not reviewable by this court. Numerous cases have held that when appeal or certiorari is taken to this Court to review the judgment of state courts on questions of pleadings, such an appeal or certiorari would not lie because the jurisdiction of this court had been prematurely invoked. This question was ably settled by Mr. Chief Justice Taney in the case of *Heirs of DeArmas v. United States*, 47 U.S. 103, 6 Howard 103, in which it was held that an order sustaining a demurrer, being only a question of pleading, was not a final judgment. The leading case of *Bostwick v. Brinkerhoff*, 106 U. S. 3, held that the judgment of the Court of Appeals of New York holding the lower court in error for sustaining a demurrer was not a final judgment because, even though it had been decided that the suit could be maintained, still the litigation had not been terminated and the defendant had not been adjudged guilty of the negligence complained of. This case is directly in point with the cases at bar and the State

submits that such authority conclusively precludes the petitioners from invoking the jurisdiction of this court at this stage of the proceedings. That a judgment on a demurrer, leaving the merits of the case to be determined in a future proceeding, is not a final judgment reviewable by this court, reference is made to the cases of *Meagher v. Minn. Thresher Mfg. Co.*, 145 U.S. 608, *Missouri and Kansas Railway Company v. Olathe*, 222 U. S. 185, and *Indiana ex rel Anderson v. Brand*, 303 U. S. 95.

D. FINAL JUDGMENT IN A CRIMINAL CASE CONTEMPLATES A TRIAL ON THE MERITS FOLLOWED BY A SENTENCE OR JUDGMENT OF CONVICTION.

Reference is here made to a number of criminal cases in which this Honorable Court has consistently held that before the judgment is final for the purpose of review in the Supreme Court of the United States, it is necessary that there be a trial upon the merits of the case followed by a verdict of guilty and a judgment of conviction. Perhaps, one of the earliest cases setting this precedent is that of *Rankin v. Tenn.* 78 U.S. 380, 11 Wall. 380. Mr. Justice Day in the case of *Heike v. United States*, 217 U.S. 423, holding that a decision on the pleadings in a criminal case did not constitute a final judgment, stated as follows:

> "The thing litigated in this case is the right to convict the accused of the crime charged in the indictment. Certainly that issue has not

been disposed of, much less has a final order been made concerning it, leaving nothing but an execution of it yet undone. * * * As the case now stands, upon the plea of not guilty, upon which the issue raised must be tried to a jury, certainly the whole matter has not been disposed of. But maybe that upon trial the defendant would be acquitted on the merits. It may happen that for some reason the trial will never take place. In either of these events there can be no conclusive judgment against the defendant in the case."

The case of *Miller v. Aderhold* 288 U.S. 206, held that in a criminal case final judgment means sentence, and a void order purporting to suspend the sentence was neither final nor a valid judgment. The case of *Hill v. Wampler*, 298 U.S. 460, held that "the only sentence known to law is the sentence or judgment entered upon the records of the Court," and that where the sentence or judgment was not so entered there was no final judgment. These two questions are ably treated with the same results in the case of *Pratt v. United States*, 102 Fed. 2nd, 275.

Mr. Chief Justice Hughes in the case of *Berman v. United States*, 302 U.S. 211, briefly decided the question involved in the cases at bar in the following statement:

"The final judgment in a criminal case means sentence. The sentence is the judgment. * * * In criminal cases, as well as civil, the

judgment is final for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined."

The State submits that the foregoing case conclusively decides the cases at bar. Here, there has been only a decision on the pleadings, the merits have not been tried, nor has there been a judgment of conviction. The petitioners insist that there has been a violation of their constitutional right of due process of law. The State submits that at this stage of the proceeding the petitioners cannot be heard to say that their constitutional rights have been violated; rather, before the jurisdiction of this Court can be invoked, there must be a trial on the merits followed by a judgment of conviction under the statute by which the petitioners are allegedly denied due process of law. If the petitioners were not convicted but were acquitted there would be no basis for attacking the constitutionality of the statute. The State earnestly contends that the same would apply when petitioners seek to attack the constitutionality of the statute even before they are convicted thereunder.

II

THERE IS HERE PRESENTED NO FEDERAL QUESTION ON WHICH THE SUPREME COURT OF THE UNITED STATES HAS NOT HERETOFORE PASSED: THE NUMEROUS DECISIONS UPHOLD A STATE'S RIGHT UNDER ITS POLICE POWER TO REASONABLY AND UNARBITRARILY REGULATE AN OCCUPATION, AND, IN PARTICULAR, THAT OF REAL ESTATE BROKER.

The State respectfully submits that if the case of *Munn v. Illinois*, 94 U.S. 113, were the law today, the petitioners' argument that the occupation of real estate broker, being harmless and innocuous, is not subject to State regulation would be tenable. However, this Honorable Court has long since ruled that a business, to be regulated by the State, need not be "affected with a public interest," rather this Court will only determine whether the regulatory statute is "unreasonable, arbitrary and capricious."

The State earnestly contends that the cases at bar present no question on which the law is unsettled. That a State by the requirement of a license and a test of competency can regulate the occupation of real estate broker has been affirmatively decided expressly and inferentially by this Court and other courts of the land. The Alabama statute in question permits no arbitrary exclusion, rather it reasonably provides that "licenses shall be granted only to per-

sons who are trustworthy and competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interests of the public * * *."

Mr. Justice Cardozo, in the case of *Roman v. Loeb*, 243 N. Y. 51, 50 A.L.R. 1329, has perhaps rendered the most complete opinion on this point. Holding that the position of real estate broker is one of trust and confidence, he stated that for the protection of the public from possible collusion and fraud, a state, under its police power, could require a license and subject the real estate broker to an examination of competency. Despite the argument of petitioners that the case of *Bratton v. Chandler*, 260 U. S. 110, did not decide upon the constitutionality of a statute regulating real estate brokers, the State contends that, quoting from Mr. Justice Cardozo's foregoing opinion, "By diction and manifest implication, if not necessary decision, the statute was sustained." Although, in the Bratton case the principle issue was to determine the validity of the method by which the real estate commission procured evidence of competency, a close examination of the case reveals that the Supreme Court of the United States considered the regulatory statute a valid exercise of the state's police power. For a summary of the numerous State cases upholding similar statutes, reference is made to the annotation found in 50 A.L.R. 1334. These cases unanimously hold that the position of real estate broker, being one of trust and confidence, and a fiduciary relationship, is subject to

regulation. The case of *Bradley v. Richmond*, 227 U. S. 477, held that a city ordinance requiring license of real estate agents, bankers, etc., not being arbitrary or unreasonable, was a valid exercise of police power.

Among other professions which have been held subject to state regulation are that of selling cigarettes (*Gundling v. Chicago*, 177 U.S. 183), selling milk (*Nebbia v. N. Y.*, 291 U.S. 502), selling loaves of bread (*Schmidinger v. Chicago*, 226 U.S. 578).

The cases cited in the foregoing paragraph held that there is no principle limiting such regulation to businesses affected with a public interest; rather the only test is whether such regulation is unreasonable, arbitrary or capricious.

The case of *Gundling v. Chicago*, supra, concerned an ordinance requiring a license for the sale of cigarettes, said license to be issued by the Mayor if he were satisfied that applicant was of good character and reputation, and suitable to engage in such business. The court held that this statute was not discriminatory or arbitrary, and that it was a valid exercise of police power. The State wishes to emphasize the similarity between this case and the cases at bar. Mr. Justice Roberts in the case of *Nebbia v. N. Y.*, supra, in a thorough treatment of the subject, summarizes the law as follows:

"If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary or discriminatory, the requirements of due process are satisfied."

With reference to the cases relied upon by petitioners, the State wishes to call to the Court's attention that *Truax v. Raich*, 239 U.S. 33 was decided solely upon the ground that the state statute discriminated in favor of its own citizens and against non-residents; and that the cases of *Wolff Company v. Industrial Court*, 262 U.S. 522, *Ribnik v. McBride*, 277 U.S. 350, and *New State Ice Company v. Liebmann*, 285 U.S. 262, tended to cling to the rule laid down in *Munn v. Illinois*, supra, which required that a business to be regulated be affected with a public interest. However, in the two latter cases it is significant to note that the dissenting opinions of Mr. Justices Stone, Holmes and Brandeis evidenced the trend of legal thought which now stands as the accepted law. These dissenting opinions discarded the requirement that the business be clothed with a public interest, requiring only that the statute be not unreasonable or arbitrary.

From the foregoing it would appear that the case at bar presents no question not heretofore decided by this Honorable Court. Not only has it been conclusively decided that the occupation of real estate broker, being one of trust and confidence, can be regulated by a state; but, also, the above cited cases include many "harmless and innocuous" occupations

which can be regulated under a state's police power as long as such regulation is not unreasonable or arbitrary.

CONCLUSION

For the reasons set forth hereinabove the State respectfully submits that the petitions for writ of certiorari should not be allowed, first, because there is no final judgment upon which can be based appeal or certiorari to the Supreme Court of the United States, and second, because this Court, as well as other courts of the land, has consistently held that the occupation of real estate broker, together with many analogous occupations, is subject to regulation by the State under its police power, such regulation effected by the requirement of a license and a test of competency.

The State earnestly requests that these petitions for writ of certiorari be denied; or, in the alternative, that the judgment of the Supreme Court of Alabama be affirmed.

Respectfully submitted,
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On the Brief.

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Brief to Hon. Horace C. Wilkinson, Attorney for Petitioners, on this the 6th day of April, 1943.

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